UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

- -x

In the Matter of:

DELPHI CORPORATION ET AL.,

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

July 1, 2009

10:13 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re Emergency Motion to Authorize Expedited Motion for Order Authorizing Debtors to Provide Expense Reimbursement to Platinum Equity Advisors, LLC in Connection with Sale of Debtors' Assets Pursuant to Master Disposition Agreement.

Transcribed by: Penina Wolicki

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P R O C E E D I N G S

THE COURT: Please be seated. Delphi Corporation.

(Pause)

THE COURT: You won't be called for a while, ma'am. So my clerk will get you when you're called.

(Pause)

MR. BUTLER: Your Honor, good morning. Jack Butler, Kayalyn Marafioti and Al Hogan here on behalf of Delphi Corporation, all found for this hearing relating to the expense reimbursement motion. We did file an agenda with the objections at docket number 17394. This is a motion that was brought on, on an expedited basis at docket number 17317. It was brought on to discussions that we had with Your Honor previously, including the chambers conference and the prior hearing, indicating that we put the request for expedited relief in the actual motion and file an affidavit, which we did, as opposed to going to the OSC route. And that matter is before the Court.

So we have the declaration of my colleague, Ms. Marafioti at docket number 17318 as well as the notice of expedited motion at docket number 17337. There have been four objections filed -- or actually, three objections and a joinder to the motion. There was an objection filed at docket number 17395 by Kensington International Ltd., Manchester Securities Corp. and Springfield Associates LLC at docket number 17396 by

the collective of DIP lenders; at docket number 17397 by the creditors' committee; and a joinder in docket number 17399 by JPMorgan Chase as administrative agent.

Your Honor, in terms of the evidentiary record today, we have prepared a record of twenty-five items, including three declarations that have also been filed publically. We have agreed with the creditors' committee, as I think Your Honor would expect, that the admission of these declarations and this evidentiary record is for the purpose of this motion only. It does not apply to evidence that would be admitted in connection with the July 23 hearing. There's a separate discovery track going on for that matter. Some of these same matters may come back up at the July 23rd hearing, but they would be developed in connection with that record and not this. And I agreed with Mr. Broude to make comment on the record.

There are three declarations that have been filed publically: That of Dan Krasner in support of the Platinum expense reimbursement motion and then Mr. Sheehan, the company's chief financial officer, at Exhibit 2; and Exhibit 3, Mr. Shaw from Rothshild, on behalf of the motion as well. As I indicated earlier, Exhibit 4 is the declaration of my colleague, Ms. Marafioti. The balance of the proposed exhibits relate to pleadings that have been filed and a series of additional documents and presentation shows related to the motion and some confidentiality nondisclosure agreements, as

well as the objections.

With the agreement that I placed on the record with the creditors' committee, Your Honor, and subject to cross examination when I present them of the declarants, I would move admission of the evidence -- of the exhibits into evidence.

THE COURT: Okay. Any objections to their admission on that basis?

MR. O'CONNOR: Your Honor, Brian O'Connor from Wilkie Farr & Gallagher on behalf of the collective of DIP lenders. The only objection, Your Honor, is as you'll hear, when we have a chance to speak, this motion was brought on on such an expedited nature that we've had no opportunity to take any discovery. One of the arguments I will make later, Your Honor, is that we think if Your Honor doesn't deny this motion as a matter of law, even if you were to accept everything the debtors say as true, we would believe you ought to defer consideration of the motion until at the sale hearing, and during the interim we'll take discovery and be in a position to raise objections and cross examine witnesses on these facts at that time.

MR. BUTLER: Your Honor, from the debtors' perspective, we actually discussed the timing of bringing on this motion, the date it was going to be brought on, in a chambers conference in which the Tranche C collective participated --

THE COURT: But this is just on the evidence coming in.

MR. BUTLER: Right.

THE COURT: And there's no objection to the evidence coming in, it's just a reservation of rights on this one legal argument which we'll address later. So on the basis that you stated, Mr. Butler, I'll admit the proposed exhibits.

(Declaration of Mr. Krasner was hereby received in evidence as Debtor's Exhibit 1 as of this date.)

(Declaration of Mr. Shaw was hereby received in evidence as Debtor's Exhibit 3, as of this date.)

(Declaration of Mr. Sheehan was hereby received in evidence as Debtor's Exhibit 2, as of this date.)

(Declaration of Ms. Marafioti was hereby received in evidence as Debtor's Exhibit 4, as of this date.)

(Balance of Exhibits were hereby received in evidence as Debtor's Exhibits, as of this date.)

MR. BUTLER: Thank you, Your Honor. Your Honor, and then in terms of presenting the declarants for any cross examination the parties may have for the purpose of this record, I first present Mr. Sheehan, the company's chief financial officer, with respect to his declaration, which is Exhibit B to the motion, and Exhibit 2 to the record.

THE COURT: Okay. Does anyone want to cross examine Mr. Sheehan?

MR. O'CONNOR: Again, Your Honor, we'd reserve our rights to examine these witnesses at a later point in time. I don't think we're in a position to do that today, given the expedited nature of the motion and the lack of any discovery.

MR. BUTLER: Your Honor, on that point, the Tranche C collective, as I said, was at the prior chambers conference when the state hearing date was selected, and they have not, since being served the motion a week ago, they have not sought any discovery of any kind, on an expedited basis or otherwise. And for them to sit on their hands and then walk into court and say I didn't have any opportunity because I didn't choose to ask to depose these folks, I think shouldn't be countenanced by the Court.

MR. O'CONNOR: Your Honor, here's one comment, and that is, I understand -- I was not present at that chambers conference -- but I understand from my colleague, that although Mr. Butler said they would do it on an expedited basis, no date was selected.

THE COURT: Okay. Well, I may have questions of Mr. Sheehan, but let me ask you, Mr. Butler. Maybe this can just be clarified by you on the record based on his -- my questions go to his affidavit, and I just want to make sure I understand it clearly.

First, paragraph 39 of his affidavit which is on page 16, states, "A fundamental change in the landscape of these

cases occurred in mid-April, when GM with the support of the auto task force, agreed to support a comprehensive resolution of the Delphi Chapter 11 cases. On April 18, 2009, GM provided a comprehensive proposal directed at Delphi's DIP lenders. Importantly, the proposal provided for payment in full of the Tranche A and Tranche B DIP lenders and offered the Tranche C lenders a recovery of approximately three percent in cash and a sixty-seven percent economic interest in the equity of a newly capitalized Delphi. The proposal made clear that GM was prepared to fund the company pre- and post-emergence. This proposal made by GM provided the same basic transaction structure that GM and Platinum ultimately negotiated in connection with the MDA transaction."

So my question that I would ask Mr. Sheehan is, am I right that at that time GM had not negotiated its agreement with Platinum?

MR. BUTLER: That's correct, Your Honor.

THE COURT: Okay. And then turning to page 25 paragraph 59, Mr. Sheehan states, "Platinum represented to me that as of May 31, 2009, it has third-party expenses of approximately 20 million dollars that are related to its overall due diligence in connection with a Delphi transaction. Platinum hired a number of consultants including Marakon Associates, PricewaterhouseCoopers, Answerport, Inc., and the law firms of Schulte Roth & Zabel LLP, Kirkland & Ellis LLP,

and Foley & Lardner LLP, to assist them in their due diligence efforts and negotiations. In addition, as of May 31, 2009, Platinum has approximately 17 million of internal costs related to Delphi."

So my first question is, the representation of the 20 million, that includes all of Platinum's third-party expenses, including in connection with the earlier steering deal and all the other efforts during the course of the case?

MR. BUTLER: It includes all -- it includes all the expenses that have been incurred, as I understand it -- Mr. Krasner's here on behalf of Platinum. But it includes the expenses that have been accrued in connection with the two MDA agreements that are now Exhibit 20 and 21 to the record, in which they were exploring a comprehensive transaction with Delphi for all of the company.

THE COURT: But does it --

MR. BUTLER: And the answer to that question is yes.

THE COURT: But it also includes the steering deal and everything else?

MR. BUTLER: Yes, which was --

THE COURT: Okay.

MR. BUTLER: -- part of the overall diligence here that allowed them to move forward.

THE COURT: Okay. And the 17 million of internal costs, has the company done any analysis of what those are?

MR. BUTLER: There have been some discussions between Mr. Sheehan and Mr. Krasner regarding that. Here has not been a complete documentation supported with that. There have been discussions between the two principals about those expenses. And obviously, Your Honor, the aggregate of those two numbers is 37 million, and Delphi proposes to cap this expense reimbursement at 30 million.

THE COURT: Okay. All right. So I don't need to have any questions of Mr. Sheehan. And since no one else has any questions, I take it, I'll accept his affidavit as the proffer of his testimony.

MR. BUTLER: Your Honor, the next witness we'd proffer for cross examination is William R. Shaw, managing director of Rothschild. His declaration is Exhibit 3 to the record and Exhibit C to the motion.

THE COURT: Okay. Does anyone want to cross examine Mr. Shaw?

MR. O'CONNOR: Same reservation of rights, Your Honor.

MR. PORET: Your Honor, Charles Poret from Dechert on behalf of Manchester and Kensington. We join in the reservations that the collective has made.

THE COURT: Okay.

MR. RESNICK: Your Honor, Brian Resnick of Davis Polk for JPMorgan, the administrative agent under the DIP facility. We join in as well.

THE COURT: Okay. I have no questions of Mr. Shaw on his affidavit, so that will be a proffer of his testimony as well. Accepted.

MR. BUTLER: Thank you, Your Honor. And, Your Honor, the next declaration we would offer is that of Dan Krasner from Platinum. That's Exhibit A to the motion and Exhibit number 1 to the record.

(Pause)

THE COURT: Okay. Does anyone want to cross examine Mr. Krasner?

MR. O'CONNOR: Same reservation of rights on behalf of the collective of DIP lenders.

MR. PORET: Your Honor, given the fact that Delphi has submitted that there is no present documentation on any of these expenses and that they purport to cover prior unrelated transactions, we too will reserve rights on this.

MR. RESNICK: Same reservation on behalf of the DIP agent.

THE COURT: Okay. I have no questions of Mr. Krasner. So I will accept his declaration.

MR. BUTLER: And finally, Your Honor, the last declaration is Exhibit number 4 to the record, which is the declaration of my colleague, Ms. Marafioti, which I would offer into --

THE COURT: And that's in support of the entering of

the order to show cause?

MR. BUTLER: Correct.

THE COURT: Okay.

MR. BUTLER: For the expedited hearing, as Your Honor indicated.

THE COURT: All right. Okay. Does anyone want to cross examine Ms. Marafioti?

MR. O'CONNOR: No, Your Honor.

THE COURT: Okay. Very well.

MR. BUTLER: Your Honor, I think that completes the evidentiary record in support of the motion. We have, in connection with the objections which we received yesterday afternoon, have prepared an omnibus reply and we filed it -- made it available to the parties, and we've made it available to the Court. And in that, we summarized the objections that have been reached and that have been lodged and our proposed response to each of them -- our actual response to each of them in terms of the debtors' views.

We believe the positions are largely incorrect and in several instances totally inapplicable to this motion. A couple of things I think I'd like to say at the outset, Your Honor, and then I prefer to expedite the hearing by responding to the objectors after they've had a chance to address the Court, if that's acceptable, Your Honor.

THE COURT: Okay.

MR. BUTLER: But I do have a few things I'd like to place on the record first.

THE COURT: Okay.

MR. BUTLER: Or answer the Court's questions, if the Court would prefer.

THE COURT: Well, I had an initial question, which is -- and when I addressed this issue at the last hearing, I had not thought of this point. But how, other than through consent, would this relief be capable of being granted, given Section 13(a) of the DIP order? And by consent, I mean consent of the DIP lenders.

MR. BUTLER: Your Honor, I think, as we've indicated on our chart here, that the -- and this is objection number 8 on page 4 of the chart -- is the Court provided the opportunity for an expense reimbursement provision here in connection with the modifications the Court made to the debtors' motion seeking preliminary approval of the plan modification motion back on June 10th. And specifically, there were a series of changes that were made that are focused on in paragraph 46 of the order, entered at the -- with the approval of the DIP lenders and at their urging.

It provided that, "The debtors may seek Court approval in recognition of the company's buyers' expenditure of time, energy and resources of an expense reimbursement or other form of buyer protection to be paid from the proceeds of the

successful alternative transaction, if the company buyer is not the successful bidder, as such term is defined in the supplemental procedures. If the Court approves such reimbursements or other protection, such order shall become part of the supplemental procedures." Seeing as it's to become part of the supplemental procedures, that contemplates that would have been done on an expedited basis. The lenders did not reserve any rights with respect to that -- with respect to paragraph 46. And in fact --

THE COURT: But it says "if". I mean, you could seek it, but I don't buy that one. I'm sorry.

MR. BUTLER: Well, Your Honor --

THE COURT: I mean, you're saying that even though I say "the debtors may seek" and "if granted it will become", and saying that that's a waiver by the DIP lenders?

MR. BUTLER: No, Your Honor. What I'm saying is that at the -- if you look at the record of the hearing on June 10th, the DIP lenders sought a process for the debtors to evaluate unsolicited offers. And that process required, among other things, in order for General Motors to provide the continued financing to the company, the 250 million dollars, in order for General Motors to go forward as part of the unitary master disposition agreement, it required a number of changes to the agreement, and it required the last eighteen lines or so of paragraph 46, dealing with the savings clause in here for

what GM was able to do with alternative transactions in setting up this process.

There was discussion on that record about whether the -- what should be made available to the company buyer, in this case Platinum -- the company buyer, in connection with those changes. And when you go back and examine that record, it was at least the company's view, and I think Parnassus relied on it when they agreed with GM to make the changes to the MDA and to agree to this paragraph 46 as it was entered, and GM agreed to it in order to provide the continued financing, that the -- I think people relied -- Parnassus relied on the record, as I think the debtors and GM did. And there was nowhere in that record when there was a discussion of providing under those circumstances, under the changed circumstances, of providing some form of expense reimbursement to Parnassus, was there any reservation of right or objection by the lenders who actually sought that --

THE COURT: Well, didn't Mr. --

MR. BUTLER: -- relief.

THE COURT: -- didn't Mr. Abrams in quite high dudgeon and said there's no right to this, and I said, well, why don't you talk to them? I don't know whether there was any discussion. Given the objections, obviously there was no agreement.

MR. BUTLER: Fine.

THE COURT: All right. Anyway, why don't we move on to the other responses. That was my only real question, and then you can go on to your remarks.

MR. BUTLER: Your Honor, we're certainly, in connection with this, relying on the record of June 10th and relying on the form of the order that was entered. And we've reserved generally our view of the application of the provisions of the DIP credit agreement.

As you know, the lenders are taking the position that this Court can neither confirm a plan nor approve any sale without their consent, that they have absolute veto right over any actions that this Court might take for any resolutions of these cases. That is their position. We don't agree with it. We intend to litigate that on the 23rd as it relates to the overall transaction. We don't believe that the credit agreement -- the covenants in the credit agreement can, in fact, hold this estate completely hostage to the whims of the DIP lenders, when they're unwilling to exercise remedies. So they don't want to exercise remedies on the one hand, they don't want to permit a sale to go forward on the other hand, they don't want to permit a reorganization to go forward, on the third part.

I don't think that's what the DIP order contemplates. I don't think that's how one reads the DIP agreement. And ultimately, the covenants in the DIP agreement, which lead,

under the DIP agreement to breaches in the ability to exercise remedies, we're already well beyond that, because this DIP matured six months ago. And I don't believe that you can use the provisions of the DIP agreement in the way in which the lenders choose to use them. We didn't intend to argue that this hearing and deal with it. We think that's more for the July 23rd hearing. But that's certainly the position that they've taken with us and they've taken in their papers, that neither the Court nor the debtors can do anything. We can't advance to Go, we can't collect 200 dollars or anything without their consent.

THE COURT: But this is not the day for that argument. This is a much more limited point.

MR. BUTLER: Oh, this is the tip of the iceberg of that argument, Judge. That's why it was made.

THE COURT: Okay.

MR. BUTLER: The points that, Your Honor, I wanted to make to the Court really dealt with paragraph 46, because I think the statements that were made in some of the objections are just simply incorrect. It said that there are -- it simply inferred that there were no changed circumstances that would have justified an expense reimbursement being granted here in these circumstances. And I would point Your Honor to the last section of paragraph 46, starting with the phrase that "In order to facilitate an alternative transaction, notwithstanding

any other provision in the master disposition agreement or any agreement contemplated thereby or any agreement between GM and Parnassus and their respective affiliates, GM is entitled," and it goes on to say all the things GM can do to facilitate an alternative transaction, and makes it clear that neither Parnassus or any of its affiliates would have any claims for breach of the MDA or any of the other agreements between the two parties as a result of the actions permitted by that paragraph.

That was language that was negotiated in the days following Your Honor's ruling on June 10th that led to the modification of procedures order being entered on June 16th. And it is, I think, the changed circumstance without which GM would not have provided the financing, without which it was clearly GM's view that they were not able to facilitate any kind of alternative transaction, to the extent that they were a necessary party. I think most people believe them to be a necessary party to any ultimate transaction or disposition of these cases under the circumstances. And that required a further set of consensual agreements between Parnassus and GM for the benefit of this process and these estates. And I simply wanted to make sure that the argument today was grounded in paragraph 46.

Your Honor, that was the -- paragraph 46 was the principal point I wanted to make in our opening, and then I

wanted to respond to the objections that were placed on the record. We've already done that in our reply, but I'll answer any questions the Court has or address the objectors as they decide to present their objections.

THE COURT: Okay.

MR. O'CONNOR: Good morning, Your Honor. Brian O'Connor from Wilkie Farr & Gallagher on behalf of the collective of DIP lenders. I think I can be brief. I think all of the objections are pretty much the same in terms of the arguments they set forth. So let me try to expedite this.

First, Your Honor, I think it's a misnomer to characterize the relief being sought as an expense reimbursement. What the debtors are asking for is to pay Platinum 30 million dollars, or as Your Honor has pointed out, 20 million dollars in third-party expenses, and some balance in what they call internal costs.

First of all, the record is totally insufficient, I think, for Your Honor to grant that relief. That includes restatements in the declaration about what we're told from the debtors about what those expenses are. It's clear that those expenses go well beyond any expenses that were incurred by the Platinum in connection with the MDA, which they only began to negotiate in April and concluded in June.

I think the debtors have been forthright in admitting that what they're asking to do is to reimburse Platinum for

expenses that may go back as far as three years. And there's nothing in the record to explain what portion of the 20 million dollars in expenses relate to the MDA transaction as opposed to, as Your Honor asked, the potential purchase of the steering business or what Platinum has also said they did, and that was to go out and talk to customers in the industry and the UAW, just to understand the automotive industry, perhaps for purposes unrelated to Delphi.

So, Your Honor, I think when it comes to internal costs, I think now we're talking about what really amounts to a breakup fee, not expense reimbursement. These are apparently 17 million dollars in lost opportunity costs. So I do think that we ought to look at this, not as a pure expense reimbursement, but at least in part as a breakup fee. So then we need to look at what's the purpose of breakup fees.

And the purpose of the breakup fee, obviously, is designed to induce a bidder to step forward and to agree to go forward as a stalking horse. And, Your Honor, I don't see how, on the record, Your Honor could conclude that that's the case here, given the fact that Platinum had already entered into the MDA. It entered into the MDA without insisting or bargaining on any expense reimbursement or breakup fee. It is obligated under the MDA to proceed. As the debtor said, I think, in their last conference with the Court, they said there are no outs for Platinum under this agreement.

And so to say now that we need to incentivize Platinum to proceed as a stalking horse, well, it's a little late to do that. That stalking horse left the barn a while ago. There certainly is no need to incentivize Platinum to continue to do what it's already obligated to do. So from that perspective, the whole purpose of a breakup fee doesn't -- would not appear to be implicated here.

THE COURT: Mr. Butler's point is that while Platinum may have had no outs under the MDA, the MDA apparently contemplates separate agreements between Platinum and GM which would restrict GM's abilities to talk to third parties, and that in contemplation of a right to seek the breakup fee, Platinum waived those requirements --

MR. O'CONNOR: Well, Your Honor, I still --

THE COURT: -- or waived those covenants.

MR. O'CONNOR: -- right. I still don't think that changes the fact that the agreement that we're talking about, the MDA, Platinum was already obligated to pursue. I think it's --

THE COURT: But his point is that the MDA is tied into, in fact, the more important agreements, are the agreements between Platinum and GM that the debtor's not a party to.

MR. O'CONNOR: Well, the other point I would make on that, Your Honor, is that certainly, it could not have come as

any surprise to anyone in this case that it was entirely possible, given the Chapter 11 context, that the so-called private sale that Platinum wanted to go forward with would, in fact, be opened up to a market test through a public auction process. They are aware of that was a possibility. In section 9.4 of the agreement it's clear that they were aware of the fact that a government authority, including the Court, could require the debtors to open this up to a public auction process. And again, they took the risk at that point to go forward with that process knowing it could be opened up, knowing that other things might have to be done. And they chose to do that without bargaining for a bid protection like an expense reimbursement or a breakup fee.

And I don't see why, at this stage , that the estate should be burdened with, or more importantly, really our clients, the DIP lenders, should be burdened with having 30 million dollars of proceeds paid out just to require Platinum to go forward with the risk that it assumed.

Your Honor, the other point on this is, if you look at this as a breakup fee, or at least in part a breakup fee, it clearly is excessive. First of all, there was no documentation as to what the expenses are. There are 20 million dollars. They relate to a three-year period. How much relates to the MDA? It's completely unclear. I have no idea what the internal costs are, what they relate to. I assume they relate

to the three-year period as well. And if you were to look at this and analyze this in terms of the traditional breakup fee case law, I mean, breakup fees are normally in the range of one to three percent, three percent at the highest.

And if you look at what Platinum is contributing here, it's equity of 250 million dollars to the acquiring entity. And even if you viewed that as consideration going to the debtors, which it's not, that 30 million dollars would be twelve percent, four times the highest range of any of the cases that have approved a payment of breakup fees. Your Honor, we think that that's certainly going to chill the bidding. I won't address the argument about the DIP order. I certainly -- you know our position on that, that you could not grant this relief without violating the DIP order.

And the final point that I'd make, Your Honor, is as I said in our reservation of rights, if Your Honor doesn't deny this as a matter of law, even accepting the facts in the record, the evidence that you've admitted, we do think that you ought to defer consideration of this until the sale hearing. One of the -- of course, the purpose of a breakup fee is to encourage bidding, not chill bidding. And until we see the results of the auction, you're really not in a position to determine whether or not whatever Platinum contends it's done has benefitted the estate. And in the interim, we'd be able to take discovery and be in a position to look at exactly what

these expenses are, what these costs are.

THE COURT: Well, leaving aside the discovery point, wouldn't that mean that the Court should defer every request for a breakup fee or expense reimbursement?

MR. O'CONNOR: Well, I think in some ways, yes, Your Honor; in the sense that until you see whether or not the estates benefit -- if you want to adopt the O'Brien test in the Third Circuit -- until you see what the results of the auction are, you're not really in a position to determine whether it's going to benefit.

THE COURT: But the Third Circuit dealt with the facts at hand, which is that there was no pre-approval. But on the other hand, courts in the Third Circuit routinely approve breakup fees and expense reimbursements before auctions, and include the recognition of the need to deal with that in the bidding procedures.

MR. O'CONNOR: Well, that's true, Your Honor. But in the normal case, this is done in two steps. The bidding company insists on getting preliminary approval by the Court of the bidding protections. They didn't do that. They chose not to do that here. And I think, under the circumstances, even if you were to tentatively approve something, I think you'd have to take a second look at it to see whether there's actually been a benefit to the estate.

THE COURT: But doesn't that argument really just go

back to the first one, which is, that Platinum took the risk originally?

MR. O'CONNOR: I think so. I think that's the predominant argument, Your Honor, that they're big boys; they walked into this with their eyes open; they knew that there was the strong likelihood that they were not going to be able to do this on a private sale. They didn't ask for any preliminary approval to bind them to the contract. And now, after the fact, they're coming in, and essentially the debtors want to give them a gift at this point of somebody else's money, and we don't think that's appropriate.

THE COURT: Okay.

MR. O'CONNOR: Thank you, Your Honor.

THE COURT: Thank you.

MR. PORET: Your Honor --

THE COURT: You can stay there if you want. It's no problem.

MR. PORET: Charles Poret from Dechert. Mr. O'Connor has essentially said it all. I would just like to point out that in response to your question, responding to what Mr. Butler said that the Platinum gave up certain rights in order to open up this bidding process, including allowing the Parnassus-GM agreements to be seen and not kept part of their private sale. Well, it's my understanding that to this date we still haven't gotten those documents. We still haven't gotten

most of the schedules to the MDA. That if their argument that it's consideration for asking for some reimbursement or breakup fee after the fact when they consciously entered into a transaction without bargaining for such or seeking approval of such, then there's a failure of consideration right then and there.

On the June 16th transcript Your Honor even indicated, on pages 15 and 16, that any possible expense reimbursement or breakup fee would have to bear a reasonable relation to the amount of value added. There's been no evidentiary proof of any value added to these proceedings by Platinum by going into a private deal with Delphi. And you also indicated on page 16 that if this was appropriate at all, it would come up later on in a 503(b) situation.

We think that essentially, to sum up, on this record, to request an order approving a 30 million dollar fee or a fee of any amount without submitting any evidentiary support, any out-of-pocket expenses, legal fees, any other expenses, any analysis of internal time and costs, and that it carries over to several transactions, including an attempt to buy the steering division, which failed, it's just way overreaching and should be denied as a matter of law.

THE COURT: Okay.

MR. RESNICK: Your Honor, Brian Resnick, again, for the administrative agent. We join in the objections by Wilkie

and Dechert and agree with what they have said. We appreciate that the debtors have clarified in their reply that this fee would not be payable in the event they pure credit bid, is the successful transaction. And we just wanted that to be clear on the record.

Also, we vehemently disagree with the debtors' reading of the DIP order and the DIP documents, but we agree with Your Honor that that should be reserved for another day, and of course, we reserve all rights with respect to those arguments. And we also agree with Your Honor that there was no waiver in any of the prior hearings of our rights to argue that our consent is required under paragraph 13(a) of the DIP order.

MR. BROUDE: Good morning, Your Honor. Mark Broude, Latham & Watkins LLP, on behalf of the official committee of unsecured creditors. There are a few problems that we have with the relief that's being sought today, Your Honor. As Your Honor has recognized, the expenses for which the debtor is seeking to reimburse Platinum do not relate entirely to the transaction that's before Your Honor, but in fact go back over three years, and include some untold amount of money that Platinum spent in connection with the steering transaction.

Now, as Your Honor may recall, Platinum was the stalking-horse bidder in the steering transaction. At the time of that transaction, Your Honor entered an order approving bidding protection for Platinum, including the reimbursement of

these very expenses. Now, Platinum was the winning bidder in that transaction, and so wasn't paid those expenses, but then it ultimately walked away from that transaction. So in effect, what they were seeking today, Your Honor, is to get another set of reimbursement expenses for expenses that Your Honor has already dealt with before.

The fact that some of that knowledge is useful today does not justify including that in today's expense reimbursement. Further, there's really no basis to include reimbursement of internal expenses. I'm not sure if they're asking for the estate to pay some portion of the salaries of the people involved or other sort of expenses that are usually just part of the cost of doing business.

Second, Your Honor, the debtors have provided absolutely no justification for the 30 million dollar figure other than Platinum has already spent it. There is no attempt in Mr. Sheehan's affidavit or in Mr. Shaw's affidavit to justify that as a -- in relationship to what Platinum's actually paying. In fact, Your Honor, in terms of what is out-of-pocket expenses or out-of-pocket cost of Platinum, which is one dollar, it's actually a 3 billion percent breakup fee. And there's just absolutely no attempt made to justify that in relation to the value the estate is receiving.

Even if one could argue that somehow Platinum is directly responsible for the 250 million dollars that GM, not

Platinum, has provided to the estate, as Mr. O'Connor mentioned, that's a twelve percent fee, which is still several times larger than what are traditional fees in these cases. We think that, quite frankly, if there's to be a fee at all, a much more rational fee is something that is measured in the neighborhood of 5 to 7 million dollars as a function of the 250 million dollars that GM is providing, certainly not 30 million dollars.

Finally, Your Honor, I don't actually view this as similar to other breakup fee situations where, in fact, you are provided up front. Everybody here that's in the courtroom today, the DIP lenders, the creditors' committee and others, have objected to the fundamental nature of the sale. And what's unique about this, Your Honor, is the involvement that General Motors and the United States Treasury have had in the sale. I mean, when you go through the papers that the debtors have submitted, and particularly the affidavits of Mr. Sheehan and Mr. Shaw, what's clear is that Platinum negotiated its deal with GM and Treasury and presented it to the debtors.

The debtors ultimately -- frankly, the debtors had very little choice in this matter, and that's an issue we will be dealing with at length on July 23rd. But this is not a normal situation where the people may object to whether a sale today is appropriate. What we're talking about is a process which many people in the room view as being fundamentally

flawed. And if, in fact, at the end of the day, Your Honor would rule that the whole process was flawed, then the basis for seeking the expense reimbursement would then go away. So we believe that, if Your Honor is otherwise inclined to grant the fee, we think it should actually be deferred to the July 23rd hearing.

THE COURT: Well, let me just briefly address that last point. The bidding procedures contemplate third parties coming in and making a bid. And they are supposed to have access to not only the transaction documents that Parnassus and Platinum have negotiated with the debtors, but also with GM. Why wouldn't that be a benefit in that they would have access to those documents that they could say to the debtors, they could say to GM, we're willing to pay more and step into those documents? They in essence have a template then.

MR. BROUDE: And, Your Honor, I would agree with that. But that presupposes Your Honor ultimately approves the transaction at the end of the day.

THE COURT: Well, I understand. But if I don't approve it, then they don't get their bid, right? Because you have a credit -- I guess the alternative is a pure credit bid.

MR. BROUDE: Well, that's -- understanding the --

THE COURT: Well, I guess that's an issue. When the debtors say it doesn't include a pure credit bid, I am assuming it also doesn't include foreclosure, right?

MR. BROUDE: I would hope not, Your Honor. And I guess to the extent that this fee, if approved today, would only be payable if, in fact, Your Honor approved a transaction, then that's what I think addressed that last point. Because if Your Honor ultimately decides that, in fact, the whole process is flawed, no transaction should be approved, then by definition the fee wouldn't be payable.

THE COURT: Okay. Mr. Butler, could we address that last point, first?

MR. BUTLER: Your Honor --

THE COURT: When I reread the bidding procedures, I didn't actually see a definition of alternative transaction. The term was used, but it didn't really -- it wasn't really defined. Is it meant to be -- I'm assuming it's meant to be something I approve, either as part of the bidding procedures or down the road.

MR. BUTLER: Yes, Your Honor. And, in fact, and we say it clearly in our response and clearly -- we believe it's clearly in our motion seeking this, is the debtors have actually worked very hard to put limitations on this expense reimbursement. It is not payable in connection with a pure credit bid. It is not payable in any circumstance unless a higher or better alternative transaction is both approved by Your Honor and actually consummated. So this isn't one -- many times these triggers come when you veer away from the current

deal.

This isn't what's before the Court. What's before the Court, in plain English, what our motion says, what our documents say, what our response says is, this only gets triggered if there is an alternative transaction. That means an alternative transaction that occurs in connection with the supplemental procedures in which the case -- and I agree with Mr. Broude's footnote in his response, because I think he got it and he read it and he put a footnote in, which I think amplifies what the debtor said, which is -- in his response, which says in -- I don't have the exact footnote number here, but it makes it clear that this is not payable unless an alternative transaction is consummated and closed.

So that's not a foreclosure. It's not a pure credit bid. And that has been plain from the start. There was an important limitation. I think Mr. Harris will, when he gets up and he wants to comment, will acknowledge that that's precisely what we talked about with Platinum. And that's what the relief we sought was from the beginning. So I'd just --

THE COURT: Okay.

MR. BUTLER: -- answer that point up front.

THE COURT: Okay.

MR. BUTLER: It was, to us, an important limitation. And part of the problems we have here is we go and negotiate those important limitations, as Mr. Broude in his papers

acknowledged, because he referenced it, and then we get objections to just, you know, there's a straw man out there that these create affordables that just don't apply here. This was a carefully crafted acknowledgement of when this thing ought to be paid.

I also think, Your Honor, that, as Your Honor considers the various objections that have been lodged, I do think it's important, and I think Your Honor got the gist of the argument earlier, but I do urge Your Honor to take into account very carefully the paragraph 46 language that GM required be in there in order for GM to move forward and fund the estate and in order for the MDA process to move forward. Because that was the product of discussions between the debtors, GM and Platinum. And the reality is, there could have been this transparent process that Your Honor was seeking with respect to the debtors' consideration of unsolicited third-party offers. But if, in fact, it was akin to an exclusivity arrangement between GM and Parnassus, such that GM couldn't talk to anybody else, that process would have had, really, no legitimate opportunities, in the debtors' view, to go anywhere.

And so ultimately, the language in paragraph 46 was crafted, it was something that was designed by General Motors. We thought it was eminently reasonable. And it represented a change circumstance. And it's in that context that the Court, I think, needs to consider this proposal. It's the very same

paragraph in this proposal we discussed. And of course, as Your Honor knows, the order that was submitted to Your Honor, the deal that had been struck between GM and Delphi and Parnassus for those changed circumstances, was that the 30 million dollar transaction fee be approved as part of the modification of procedures order. And Your Honor, on the record at the June 16th hearing, indicated it was disinclined to approve it on that record, and wanted us to bring it by separate motion.

Now -- which we have done. Now, the experience in these cases up till now has been, in each of these cases -- and this was brought in the same way that's consistent with this, is the expense reimbursement has, in no -- we've sold billions of dollars'-worth of businesses in this case, and we have never proved up the expense reimbursement in court. Not one time. And in fact, under the steering deal, just to correct the record, Platinum did not walk away from the steering deal. Ultimately, as Your Honor recalled, there was a discussion and negotiation between General Motors and Delphi about an enhanced steering exercise option that had a lot of beneficial arrangements in it for Delphi. We filed that motion, and as part of that -- and you may recall, it was included in that motion -- we entered into a termination agreement with Platinum in which they agreed that their relationship with us with respect to that transaction would be terminated.

It was hardly a walk-away. And they agreed to release -- even though an arguably, an expense reimbursement provision was payable, it was 6 million dollars in that transaction, by the way, that that 6 million dollar payment for what was a transaction that is dwarfed by this MDA, they agreed to waive any liability of the estate for payment of that transaction fee. So I think to say on the record that they somehow walked away and they aren't entitled to things, they walked away, and in the context of that transaction, seeking to continue to cooperate with the debtors, released the estate from any liability as it related to that agreement.

THE COURT: Who gets the steering business under the MDA?

MR. BUTLER: Ultimately, this is an integrated transaction. It goes to GM. And that's one of the things I think that has been another sort of theme here. And I think you're going to see it maybe play out in an effort by some of the lenders at the sale hearing, is this is -- the MDA is an integrated transaction. In order to be able to accomplish it, there were a series of principles that had to be agreed to.

And I couldn't disagree more with the statements made on this record by Mr. Broude that because his -- the evidentiary record will not support that the debtors played -- did not play a material role in the negotiation of the MDA. Quite to the contrary, the debtors, as was clear in Mr.

Sheehan's declaration, which has been admitted into evidence, is not controverted here for this record. The fact is, in early May the debtors, in answering a question from the government and from General Motors about what would it take for the debtors to sponsor an ultimate resolution of these cases, the debtors set out a series of goals and objectives and a series of principles which it shared with the DIP lenders, the creditors' committee, the government and General Motors, as well as the private side partners that were being considered at that time. And the company stuck to those principles. And there were many, many, many changes to the structure to meet the deal principles that the company put in place there.

And so, for example, one of the very conveniently ignored items here is that, under the MDA, billions of dollars of administrative claims are assumed by the company buyer and General Motors in connection with the MDA, if and when it's consummated. And that is enormous value to this estate. And there is an enormous amount of administrative claims that are being assumed directly by the Parnassus entity that are going forward here. And so --

THE COURT: Well, when you say that it's being assumed by the Parnassus entity --

MR. BUTLER: Right.

THE COURT: -- what is the capitalization of that Parnassus entity?

MR. BUTLER: The capitalization of the Parnassus entity, as we've indicated, Your Honor, that company has 3.6 billion dollars in emergence capital and capital commitments to it from --

THE COURT: But where --

MR. BUTLER: -- from General Motors --

THE COURT: From GM?

MR. BUTLER: -- and Parnassus.

THE COURT: Okay.

MR. BUTLER: But the fact is --

THE COURT: Well, from Platinum?

MR. BUTLER: Yes, from Platinum.

THE COURT: The 250 million from Platinum?

MR. BUTLER: No, it's actually 500 million.

THE COURT: Okay.

MR. BUTLER: It's actually -- it may be more than that. It's actually at least 500 million. But the fact is, Your Honor --

THE COURT: I'm sorry, where does the other 250 come from?

MR. BUTLER: They committed to loan additional proceeds to -- if necessary, as did General Motors.

THE COURT: Okay.

MR. BUTLER: The total commitment's 500 million from them, as has been disclosed, not 250 as it relates to that.

But they also will end up operating this business. And what I --

THE COURT: But that's a loan, right, not a capital contribution?

MR. BUTLER: Yeah, it's a loan to a privately held company that they own.

THE COURT: Right.

MR. BUTLER: So Your Honor can --

THE COURT: But at that point it owns this business?

MR. BUTLER: Yes, it owns the business, but --

THE COURT: Right.

MR. BUTLER: -- you asked how is it that billions of dollars of estate obligations are going to be paid. They're going to be paid by the MDA counterparties but they're putting in capital to pay them. And one of the things that we seem to be missing here is that the only transaction that's been able to be put on the table in the last fifteen months -- and the plan investors walked away -- that is feasible, fully funded, essentially unconditional and capable of execution is the MDA. All right. And there's been billions of dollars committed to it, and there are billions of dollars of estate obligations that are being satisfied. And to trivialize that, people try to pull it away and try to divide it. It is an integrated transaction that's before the Court, and that's what's going to be before the Court on the 23rd.

And I think -- you know, and by the way, that same -- that transaction going forward and having that comprehensive resolution was an absolute requirement. And the evidentiary record here, the letters from the government make very clear, and from General Motors, make very clear that having that comprehensive resolution was an absolute requirement for GM, with the support of the government putting in 250 million dollars in this case, to provide incremental liquidity. A total of 850 million dollars has been put in by General Motors since last December to support the operations of this business; zero has been put in by anybody else.

And the reali -- and those are the realities of these cases. I mean, the reality of these cases is to maintain value for our stakeholders. We have been able to find the liquidity, we have been able to find the transactions, and we presented them to the Court, the only one that at least I'm aware of exists that's a viable one. And we have agreed, obviously, Your Honor, and have been moving forward, to support this alternative transaction process that has been fashioned in the supplemental procedures.

I would disagree with counsel when they say gee, you haven't given us all the MDA exhibits. What they want to do is to rewrite the MDA. The MDA lists specifically in it the timetable for the creation of various exhibits to the MDA. Some had to be created immediately; they have been and they've

been shared. Others are on a longer timetable under the terms of the MDA and they're not ready yet. And they're complaining because they're not ready yet. The fact of the matter is they can't require people to operate on a timetable that's different than it's in the contract. That's not due diligence; that's trying to do something else.

THE COURT: So the debtors are provided all the exhibits to the MDA that --

MR. BUTLER: That have been --

THE COURT: -- that they --

MR. BUTLER: That have been created to date.

THE COURT: -- that they have?

MR. BUTLER: Yes. And the reality is that there's a list of exhibits, and there's more being created daily as they continue to work on it, like any other M&A transaction. But if Your Honor looks at the MDA, there are specific provisions that say these exhibits and schedules need to be created immediately and the balance of these have to be created prior to closing. And the parties are working on those to create those. Most of those schedules and exhibits are outside of the control of the debtors; they're being created by other parties.

THE COURT: So I guess the ones that had been provided are the ones that are truly integral, right? Those are the really important ones --

MR. BUTLER: No, Your Honor, I think --

THE COURT: -- since this is an integrated transaction?

MR. BUTLER: No, Your Honor, they're all integral. You look -- Your Honor, you look at a transaction at closing.

THE COURT: That's why GM put all this money in, right, because they knew they had a deal? So I'm assuming what the deal is what's in hand, right?

MR. BUTLER: Your Honor, yes, subject to complete --

THE COURT: All right, so the other exhibits are probably fairly trivial.

MR. BUTLER: Well, Your Honor, they're -- I wouldn't -- I'm not going to characterize what GM or Parnassus considers those exhibits to be. I'm saying to Your Honor it's a very normal process that's ongoing here.

THE COURT: Okay.

MR. BUTLER: It's contemplated by the contract, and people are working in good faith. And as they contin -- as they produce the documents, they're turning them over. I'm not trying to characterize what people think of each exhibit.

THE COURT: Okay.

(Pause)

MR. BUTLER: Your Honor, I think -- otherwise, I'm going to rely on the responses we put in our reply, which are -- respond to each of the nine objections that were raised.

THE COURT: Okay.

MR. BUTLER: Thank you, Judge.

MR. HARRIS: Good morning, Your Honor.

THE COURT: Good morning.

MR. HARRIS: Adam Harris from Schulte Roth on behalf of Platinum Equity and Parnassus entities. Your Honor, I'm going to start off with some brief comments, because a lot has been said about Parnassus and Platinum, and a lot of aspersions, frankly, casted in our direction for reasons I'm not totally understanding here.

THE COURT: I don't -- I didn't really see any. I mean, the only one -- and I didn't really actually hear Mr. Broude say this -- was the suggestion that Platinum had not followed through on the steering deal and that, obviously, if that were the case the debtors would have sued you a long time ago. So I don't -- anyway, you can say what you want, but I didn't really hear people casting aspersions on Platinum or Parnassus, per se. They may not like the deal, but they haven't said that --

MR. HARRIS: Your Honor, and back on the June 10th hearing, Your Honor actually asked a lot of questions about who Platinum Equity was, what we were all about, how we got here, what was the circumstances that led to the creation of the MDA, why we were the party that ultimately ended up as a party to that MDA rather than somebody else. I mean, I think, Your Honor, that the declarations of Mr. Sheehan, Mr. Shaw and Mr.

Krasner lay out very clearly how this process has unfolded. There was also a lot of statements made on that record about inferences about backroom deals; Mr. Broude raised it again today about this being a deal that was negotiated by GM and the auto task force and Platinum and just dropped on Delphi. Frankly, nothing could be further from the truth.

Your Honor, the MDA -- it was a product of negotiations between several different parties and done in parallel, if you will, as Mr. Sheehan's declaration clearly states, with ongoing negotiations with other interested third parties as well as the DIP lenders and other parties inside the case. And everybody was completely and totally aware of what was going on at that time frame. There is, and can be, no statements made by anybody that somehow they were unaware that there was a deal that was being worked on between Platinum and GM and Delphi at that point in time. In fact, we were sitting in conference rooms in the same offices, sometimes next to each other, sometimes upstairs or downstairs from one another, and we actually broke out of a negotiation session on Friday night, May 29th, to go upstairs and sit with the DIP lenders and explain to them the details of our deal and our operating plan. So for anybody to say that they had no idea what was going on or what was happening at the time is simply incorrect.

But putting that aside, Your Honor, the MDA, when we entered into it -- everybody's making a lot of statements about

we took the risk, we understood the risk that other people could show up. And, you know, in some respects, Your Honor, that's right, but you got to put it in context. When you look at Mr. Sheehan's declaration, Your Honor, this company had been out in the market, talking to third parties, talking to its DIP lenders, and was unable to bring any transaction to fruition other than ours. That was the facts that were presented to us at the time, and we understood that.

As Mr. Butler said, and we agree, we always knew that the DIP lenders had the right to either credit bid or foreclose here. We're not expecting, never anticipated, we would get any kind of protection in that circumstance. That was always out there and something to be addressed.

THE COURT: But that's --

MR. HARRIS: But --

THE COURT: Just so I get the time frame right, that's starting in, like, May of this year?

MR. HARRIS: Your Honor, the first draft of the MDA that we actually saw, which followed on several negotiating sessions regarding Platinum's presentation of its business plan and restructuring plan to GM and Delphi and the auto task force, the first draft we saw, I believe, was the Monday of Labor Day Weekend.

UNIDENTIFIED SPEAKER: Memorial Day.

UNIDENTIFIED SPEAKER: Memorial Day.

MR. HARRIS: Memorial Day Weekend. Sorry, Memorial Day Weekend. I'm getting ahead of myself here. Memorial Day Weekend. And from then forth, it was from there till June 1 that we were in substantive negotiations over the details of that agreement and a lot of the ancillary agreements which went along with it.

But when you look at the MDA, Your Honor, the MDA is taking a worldwide business and breaking it up not in necessarily easy segments but in pieces pulled out of various parts of the world, some of which are going to GM, some of which would be going to Parnassus. And that is an extraordinarily difficult and complex transaction to be able to pull off.

And frankly, Your Honor, the only reason we were in a position to do that and to agree to the terms in the transition services arrangements that have been worked out with GM is because we had been doing diligence on this company for the better part of three years. We understood the entire business; we understood the IT issues; we understand the Treasury-related issues; we understand what's going on in all the foreign countries because we put people on planes and sent them there for extended periods of time to sit with operating management at local levels to understand their businesses, how they operated, what their customer bases were, and to understand the dynamics of that and how that we'd -- how we could change the

structure to make it long-term economically viable.

So, Your Honor, all the things that are in Mr. Krasner's affidavit, all the things that are in Mr. Sheehan's affidavit, lead one to the inevitable conclusion that when the MDA was signed we had every reason to believe at that time when we signed the agreement that the only potential other party that could be interested in these assets were the gentlemen sitting at the table to my far left, the DIP lenders. No other third party was out there, and the debtors had no intention of going out to start and solicit anybody else.

THE COURT: The affidavits say that they'd been in serious negotiations with at least one and perhaps two other parties.

MR. HARRIS: But that's -- Your Honor, I believe that reference is only since the procedures were put in place subseq --

THE COURT: I don't think so. I --

MR. HARRIS: Well, there were prior to, Your Honor, but at the time we signed the MDA those parties had not agreed to the terms that Delphi felt were necessary in order --

THE COURT: Well, no, I understand that, but it's often the case that people like that come back once an agreement's signed.

MR. HARRIS: It's possible, Your Honor, but, I mean -- and I suppose that risk was out there, but the way we set up

the MDA, at the request of the debtors, was as a private transaction. We talked about expense reimbursements and breakup fees at that time. We agreed on the non-solicit provision that was in section 9.40 of the MDA. And we moved forward on that basis with a signed deal with GM, which they were locked into, and with a signed deal with Delphi, which was obviously also subject to Court approval.

Now, Your Honor, the landscape, not at our request clearly, not at GM's request, at the request of the other parties in the case, changed dramatically on June 10th. We went from what was effectively a private sale, where the DIP lenders preserved their right to credit bid or foreclose, to what is effectively an open auction process. And in the context of that, we were asked to do several things relative to the MDA, not the least of which was to, effectively, release GM from any obligations they might have to us under that contract, to work exclusively with us and under our other arrangements. We were asked to do that. We were asked to basically make other changes to the MDA to accommodate the bid procedures that have now been approved by the Court. We agreed to do that, in return for which the company agreed to move forward with this expense reimbursement motion, because, effectively, Your Honor, there's only one circumstance in which it ever gets paid. If an alternative transaction that provides value to the estate, higher than what we are providing, is approved by this Court,

the fee gets paid. It's not a credit bid situation, it's not a foreclosure. But somebody's got to come in and top the bid of GM and Parnassus.

And, Your Honor, just to put it in context, from our perspective, looking at the schedules that we've worked up with Delphi, we value the consideration to the Delphi estate on an aggregate basis under that transaction at north of five billion dollars when you take into account all the liabilities that are being assumed by GM and Delphi, the cash that's being provided, claim relief, and so forth. It is an extraordinarily large number.

Now, the DIP lenders ignore all that because, frankly, most of it's not going in their pockets. They don't consider it consideration if it's coming to them. They say, well, Your Honor, only look at the 250 million dollars that Parnassus -- that Platinum is putting into Parnassus and calculate a fee off of that. Mr. Broude said fee of two to three percent off of that. The wrong analysis, Your Honor. He's focusing on the wrong thing. What the case law says is you look at the consideration that's being provided to the estate and you calculate if off of that. And here, if you take Mr. Broude's percentage and you apply it, it comes out to a number well in excess of the thirty million dollars that's being suggested here.

There are credit -- there are liabilities of this

estate, Your Honor. All of the administrative expenses of this estate, all of them, are being picked up by Parnassus as the acquiring entity, or GM under the terms of this transaction.

And if you -- even if you just look at a piece of that, Your Honor, what's Parnassus doing, the consideration that we're picking up is still well in excess of a billion dollars. It's not a divisible transaction, but if you look at the schedule of who's picking up what, our piece of it's well over a billion dollars.

THE COURT: Where's -- how?

MR. HARRIS: Because, Your Honor, we're pick --

THE COURT: I don't see that in the MDA, which is the only thing I have.

MR. HARRIS: Your Honor, if you look at the schedule of assumed liabilities, which I forget what the cross-reference is to the exhibit, it includes picking up all of the post-petition trade. It includes picking up all the -- you know, we have -- there's, like, 65 million dollars in cures; there's the 145 million dollars of membership interests in Parnassus that are being provided to the Class C -- Tranche C DIP lenders; there's several hundred million dollars of other items. And on schedule it comes to 1.3 billion dollars that's being picked up by Parnassus. GM --

THE COURT: Where's the money from?

MR. HARRIS: It's being paid through the

capitalization of the new entity and paid over time as those obligations become due.

THE COURT: Out of the new entity's assets, right, the assets you're buying? Isn't it an LBO?

MR. HARRIS: Well, and the cash that we're putting in it.

THE COURT: The 250 million --

MR. HARRIS: The 250 million --

THE COURT: -- plus the loan --

MR. HARRIS: It's the 250 mill --

THE COURT: -- which is also going to get repaid?

MR. HARRIS: It's the 250 million that they're --

THE COURT: Are you going to say that any bidder can count towards its purchase price the financing that it provides --

MR. HARRIS: Your Honor --

THE COURT: -- as credit?

MR. HARRIS: Your Honor, you look at the consideration that's actu -- it's not --

THE COURT: I know, I'm looking at the consideration that comes to the estate.

MR. HARRIS: Right, and the capitalization of Parnassus is combined; it's 2.25 billion dollars of equity and 750 million of loans. So that 2.25 billion of equity and the future earning power of that entity is going to relieve this

estate of in excess of --

THE COURT: Have you ever seen a bidding topping fee calculated on that basis where you look at the capitalization of the acquirer?

MR. HARRIS: Your Honor, I'm not suggesting we look at the capitalization of the acquirer. I'm suggesting we look at --

THE COURT: It sounds like what you're saying.

MR. HARRIS: No, actually, I don't think I am.

THE COURT: Okay.

MR. HARRIS: I think what I'm saying is that you look at the consideration that's being provided to the estate in terms of relief of obligations or payment of its debts, and that's the basis upon which you calculate the breakup -- the expense reimbursement. The consideration here to this estate, putting aside for the moment who it goes to, is in excess of five billion dollars under this transaction.

Your Honor also raises several other questions which I'd like to just address for a moment; one of them was how you deal with paragraph 13(a) of the DIP order. Your Honor, putting aside the fact that the team of the DIP lenders have decided selectively of when to argue this and when not to, given that there have been several other breakup fees and expense reimbursements approved on other sales in the case --

THE COURT: Well, they consented there.

MR. HARRIS: I underst -- I did say "selectively".

THE COURT: Okay.

MR. HARRIS: I didn't say they didn't have the right.

THE COURT: All right.

MR. HARRIS: I believe, Your Honor, that, like in many other transactions, their rights here relate solely to matters affecting -- that constitute proceeds of the sale. Your Honor, you could extend that argument, frankly, to a buyer's agreement to assume liabilities, pay cure costs and other things, and they could argue till the cows come home that's all consideration that they should receive rather than other parties. I believe, Your Honor, that, in cases similar to this, that arguments can be crafted that basically say it's a fee that's payable by the successful bidder, it falls outside the context of proceeds and, therefore, it does not fall necessarily within the liens of the DIP lenders.

I mean, Your Honor, there are two or three other people here who have expressed interest and are doing diligence; they know about this motion. Yesterday we asked Mr. Sheehan whether any -- when these objections came in, whether anybody who's doing diligence had complained about the prospect of having to potentially pay up to thirty million dollars as expense reimbursement to Platinum should they be declared the winning bidder and close their alternative transaction. Mr. Sheehan's answer is no one has made any comments about it at

all. It is, frankly, potentially a rounding error in the context of the magnitude of the deal, including the size of the purchase price, the amount of assumed liabilities and the overall issues extant in this case.

And, Your Honor, I think at this point we have set a floor here that is going to define what constitutes potentially a higher or better offer. That incremental value is not something that is available to anybody else today. And, Your Honor, to the extent we are here setting that floor and causing other people to look at our transaction and have to overbid it, that is a direct conferrable benefit on the estate and all of its creditors for which expense reimbursement, we believe, would be appropriate.

I'd be happy to answer any questions Your Honor might have.

(Pause)

THE COURT: Yeah, that's fine, thanks.

MR. HARRIS: Thank you, Your Honor.

MR. O'CONNOR: Your Honor, may I make one brief observation? We've heard today, or after the last conference where the debtors contended that Platinum was bound and virtually had no outs, we've heard today that, in light of what's happened recently, Platinum agreed to allow GM to do certain additional things, perhaps to deal with an alternative bidder, and we've heard that they requested that the debtors

seek this relief. But what we haven't heard is that they conditioned the granting of those additional modifications on obtaining that relief. We're back in the same position as we were the first time, or slightly different. They may have asked for something this time, but unlike the traditional bidder that says I'm not going to go forward unless I get preliminary approval they haven't even asked for that now.

THE COURT: Okay.

Anything else?

MR. PORET: Your Honor, putting aside that the schedules that were referred to, the assumed liabilities, haven't been produced until the so-called due diligence phase, which is sorely lacking, this whole business ignores the fact that it was the DIP lenders who put in billions of dollars that kept this company going and alive while they developed a private transaction with Platinum. The company defaulted on its obligations. The DIP lenders extended --

THE COURT: But I don't -- how is that relevant to this motion, then?

MR. PORET: It's relevant in terms of the value that is supposedly being received by the creditors, by the DIP lenders in this transaction where one dollar is being put in to purchase the company. And through other transactions, administrative claims or other claims that were junior to the DIP lenders are going to be paid by other parties while the DIP

lenders are going to be paid, at best, twenty cents on the dollar, but in actuality a lot less.

THE COURT: But, I mean, your remedy for that is to credit bid and then this transa -- this fee wouldn't be owing.

MR. PORET: You're right. I was just putting -- trying to put in context this seemingly extraordinary request for a breakup fee approval at this time.

THE COURT: Are you -- maybe I misheard you. Are you saying that the schedule of assumed liabilities has not been provided to you?

MR. PORET: I'm told by people that have been involved in that that we haven't received that. We haven't received a lot of schedules; we haven't received a lot of agreements. Essentially, Platinum --

THE COURT: Well, I'm just focusing on that one, the schedule of assumed liabilities.

MR. BUTLER: Your Honor, the schedule of assumed liabilities, I think, has been put in there; it was also disclosed in the supplement to the disclosure statement. There are charts in there that lay out plainly what's being assumed, in the actual supplement to the disclosure statement.

MR. KELLY: Your Honor, Mike Kelly from Willkie Farr. Your Honor, a number of schedules have not been supplied to us. I know that letters have gone to the Court, and I believe Elliott is prepared to address it afterwards, but the fact of

the matter is we're playing a game of cat and mouse here and we don't have all of the information to bid against; the debtors know it. The correspondence has been back and forth. It's -- and we can address it in the chambers conference if you'd like.

MR. BUTLER: Your Honor, the schedule of assumed liabilities, by the way, those schedules were actually published in romanettes xviii and xix of the supplement to the disclosure statement and were out for the whole world to see. And the debtors certainly will prepare to address the matters in a chambers conference, but the fact of the matter is the debtors have fulfilled their responsibilities and will continue to fulfill their responsibilities in terms of due diligence. I have a lot to say about that in the chambers --

MR. KELLY: Your Honor, timing is everything, okay, and Mr. Butler knows that. At the end of the day, nobody can put together a credible bid unless they have the entirety of the package in front of them. They shouldn't have to be Lewis and Clark going hunting for things. We have assumed contracts, schedules that have not been supplied. They should be working to give everything to anyone who wants to bid. We shouldn't be chasing ourselves on this. And certainly today, where we're just talking about a breakup fee, the question is have they done enough to act and add value to the estate? And I'm just submitting to Your Honor that, as long as we're chasing them, I don't know how that can be the case.

MR. BUTLER: Your Honor, on the subject of due diligence, Mr. Kelly represents a party who has been doing due diligence in this estate since last November. This estate has paid their advisors millions of dollars in due diligence fees to do diligence to this estate. To suggest that the collective of Tranche C lenders has not had an opportunity over the last seven months to do diligence to this estate pretty much on an unfettered basis is just completely unsupported in the facts. And the fact that they then -- the parties then chose not to sign up to the protective order after Your Honor entered it for weeks, you know, they take no responsibility for anything; it's always the other guy. And the fact is if we have to prove this in an evidentiary record, we will lay it out and we will prove it. The debtors have completely fulfilled their fiduciary duties, they're continuing to do so, and this continued assassination on the record, which is completely unsupported by the facts, has to stop.

THE COURT: Well, I just wanted to focus on the schedule of assumed liabilities since that's --

MR. BUTLER: Right here in the disclosure statement, Judge.

THE COURT: Okay, so --

MR. KELLY: Is that the schedule to the contract?

THE COURT: Well, I --

MR. KELLY: Mr. Butler, is that the schedule to the

contract?

MR. BUTLER: I don't know, Mr. Kelly.

MR. KELLY: Okay. Thank you.

MR. BUTLER: All I know is that all the information is publicly posted.

MR. KELLY: Your Honor, what we're asking for, again, is to hang up the Lewis and Clark hats and instead hand us the contract with the schedules as prepared so that we know what we're shooting at.

THE COURT: Well, but the debtors have said that they haven't been -- you've gotten everything that's been prepared.

MR. KELLY: And that's my point. For today, the question is do we have a contract that we're shooting against? Answer: Absolutely not. I don't know how a breakup fee can be approved when we don't have something to shoot at. We'll deal with that on the 23rd or before, what Mr. Butler is getting at, but for the Court today, do I have a deal or do I have to go hunting through data rooms to get the underlying data? That's not what a breakup is about; that's not what a stalking horse is about.

MR. BUTLER: Just to say, Your Honor, Mr. Kelly isn't even prepared to follow the supplemental procedures. They're doing this pure credit bid and all these other transactions. They're not even prepared to follow the procedures or follow the diligence -- scope of diligence that's set forth in Your

Honor's prior orders. I mean, the debtors are going to be prepared to make a complete record of this because we are tired of being accused publicly of not doing our jobs when it couldn't be farther from the truth. And, Judge, you know, it's going to have to stop. And the fact that they think they have this form here to make it so it's reported in the media when it's completely untrue, all right, has got to stop.

The company has tried to be very reserved in how it's dealt with this publicly, because they are our DIP lenders; we are trying to work with them, all right. But we noticed that it's -- you know, that these statements are just not true.

THE COURT: Okay, anything else?

All right, I have before me a motion brought on by order to show cause under Section 363(b) of the Bankruptcy Code, authorizing the debtors to provide expense reimbursement to Platinum Equity Advisors, LLC in connection with the proposed sale of the debtors' assets pursuant to a master disposition agreement, as amended.

The debtors entered into the form of the original master disposition agreement on June 1st, 2009 and sought approval, on an expedited basis, of, among other things, scheduling the final hearing on that agreement and related transactions to be implemented through a Chapter 11 plan and, alternatively, through a sale.

I granted approval of the supplement to the disclosure

statement that set that schedule in motion. However, I required that there be an amendment to section 9.40 of the original form of the master disposition agreement which I believed too narrowly circumscribed the debtors' ability to facilitate competing transactions and ultimately raised litigation and fiduciary duty issues that, whether or not the debtors were complying with their fiduciary duties, would have unduly complicated the implementation of the transactions contemplated by the amended plan and the MDA.

Section 9.40 was subsequently amended, as well as there being subsequent amendments to third-party agreements related to the transaction between Platinum, its acquisition vehicle Parnassus, and GM. I also entered a bidding procedures order, which has since been supplemented by bidding procedures for pure credit bids as well as a clarification of a point in the bidding procedures order, all with the intention of facilitating a due diligence and alternative transaction sale process to permit competitive bids involving third parties, as well as pure credit bids.

The original MDA did not contemplate any sort of expense reimbursement or other buyer protection provisions that are often included in transactions that are subsequently bid against in bankruptcy cases. As an aside, separate and apart from there being bid procedures and courts generally viewing the promulgation of bid procedures to be a constructive thing,

any transaction, even a private sale transaction, in a bankruptcy case has the potential for turning into an auction, albeit not necessarily with bidding procedures because it must be noticed with an opportunity for objection with ultimate review by the bankruptcy court and, obviously, if one of the objections is that there's a higher and better transaction out there and the Court agrees with that, then, effectively, there's been a competing bid.

In any event, this particular MDA did not provide for buyer protections in that form. However, in connection with the hearing on approval of the supplemental disclosure statement and scheduling of the transaction hearings, the parties discussed on the record, and I suggested, that appropriate buyer protection procedures should be considered here in light of the amendments to the MDA that I was requiring.

The DIP lender collective very clearly expressed its reservation of rights on that point at the hearing at which I suggested that they speak with and negotiate with Platinum over what might be an appropriate stalking horse protection in light of all the facts. Subsequently, as part of the order approving the supplemental disclosure and setting transaction hearing dates and providing other relief, the Court approved the following, which appears in paragraph 46 of the order:

To the extent that a, quote, "potential bidder desires

to submit to the Debtors a proposed alternative transaction to be considered by the Debtors in lieu of the Master Disposition Agreement, the procedures attached hereto as Exhibit N and incorporated herein by reference shall govern in all respects." Those are the bidding procedures for third-party transactions other than pure credit bids. They've since been somewhat modified, but they still generally apply.

Then the same paragraph provides, "The Debtors may seek approval, in recognition of the Company Buyer's expenditure of time, energy and resources, of an expense reimbursement or other form of buyer protection to be paid from the proceeds of a successful alternative transaction if the Company Buyer is not the successful bidder, as such term is defined in the supplemental procedures. If the Court approves such reimbursement or other protection, such order shall become part of the supplemental procedures."

There follow three other sentences dealing with the supplemental bidding procedures. And I should note that the term "Company Buyer" means Platinum here, or Platinum/Parnassus.

Then the same paragraph provides, "In order to facilitate an alternative transaction, notwithstanding any other provision in the Master Disposition Agreement, any other agreement contemplated thereby or any agreement between GM and Parnassus or their respective affiliates, GM, its affiliates

and representatives shall be entitled to: (1) furnish to any individual or entity, which may include, without limitation, any potential purchaser, financing source or other interested party, (a) all exhibits, schedules and agreements under the master disposition agreement and any other related agreements between GM and Parnassus or their respective affiliates, and (b) information related to the transferred assets and liabilities as defined in the supplemental procedures and the transactions contemplated by the Master Disposition Agreement or by agreements between GM and Parnassus or their respective affiliates; (2) participate in discussions or negotiations with any such individual or entity; or (3) enter into and perform under any agreement, whether as purchaser, equity participant, financing source, customer or otherwise, with any such individual or entity related to any alternative transaction. Neither Parnassus nor any of its affiliates shall have any claims, including, without limitation, for breach of the Master Disposition Agreement and any other agreement contemplated thereby or any other agreement between GM and Parnassus or their respective affiliates, against GM, its affiliates or its representatives arising from or relating to any action permitted by this paragraph."

Originally, the order proposed by the debtors provided in this paragraph for the simple allowance of a thirty million dollar expense reimbursement to Parnassus in the event of a

successful alternative transaction going to a third party, but I concluded that such relief could not be granted without notice and a hearing and an opportunity for objection. And, therefore, the order as entered by the Court is as I've just read it.

The debtors subsequently sought to have such approval of a breakup fee up to thirty million dollars of Platinum's expenses incurred, it appears to me, at any time during the course of this Chapter 11 case, in connection with its efforts involving the debtors. And that motion has received four objections on various grounds. The first ground that I asked Mr. Butler to address is that the proposed relief, which would seek a finding that Platinum would receive from the proceeds of an alternative transaction an expense reimbursement in an amount of up to thirty million for expenses and costs incurred and that would also grant the motion in full, violates paragraph 13(a) of the debtor-in-possession financing order, which provides that, quote, "No claim or lien having a priority superior to or pari passu with those granted by this order to the Agent and the DIP lenders shall be granted or allowed while any portion of the financing or the commitments thereunder or the DIP obligations remain outstanding," and providing further that, "The DIP liens shall not be, in the case of the DIP liens, subject to or junior to any lien or security interest that is voided or preserved or (2) subordinated to or made pari

passu with any other lien or security interest."

The DIP lenders contend that the proposed relief would provide for a Court-approved right of Platinum to receive up to thirty million dollars from the proceeds of a transaction with the debtor out of the purchase price before payment to other parties, including the DIP lenders, and therefore violates paragraph 13(a), unless they consent to such payment. It's correctly been pointed out that in numerous instances throughout these cases the Court has approved buyer protections, including expense reimbursements and breakup fees, to which the DIP lenders did not object and therefore were deemed to have consented, and that arguably that sets some precedent. However, clearly, the DIP lenders here have objected to the proposal and, I believe, understandably so given that, unlike in the other transactions, it does not appear that under the present circumstances they'll be paid in full, whereas at the time of the other transactions that appeared to be the case, although clearly not from the proceeds of the transaction at issue.

It's also argued by Platinum that the Court, in approving this order, which has been carefully drafted not to provide for the actual allowance of any claim under Section 503 and Section 507 of the Bankruptcy Code to be had by Parnassus or any lien right to be given to Parnassus but simply provides that the thirty million dollars of the purchase price will be

paid to Parnassus, is not actually in violation of paragraph 13(a) of the DIP order. I believe this is not analogous, however, to situations where a purchaser determines where its consideration will go, including, for example, to particular assigned contracts, but is rather a requirement imposed upon the purchaser by the debtor through its request of the Court. And, to me, that seems directly in contravention of the DIP order that I quoted.

So it appears to me that unless the DIP lenders consent, which they may do at some point, the relief sought is precluded by the terms of the DIP order. To my mind, that ends the issue. However, I would also note the following, particularly since it is possible that it may be argued that the DIP lenders' consent may be implied from their lack of asserting remedies in response to a breach of the DIP agreement. Further, I continue to believe that if the parties did talk to each other in light of their actual rights under the Bankruptcy Code, they would be able to resolve this and potentially other matters on a consensual basis. Therefore, I'll address the other objections that were raised.

It was contended by the DIP lenders that the Court should not grant any form of buyer protection to Platinum or Parnassus because, effectively, Platinum has bound itself to proceed with the MDA without requiring such protection. One could read, clearly, former section 9.41 of the MDA as doing

just that. However, I can't ignore the fact that, as a part of the order approving the supplemental disclosure statement and setting the timetable for the transaction to go forward and to facilitate a sale to an alternative buyer, Parnassus waived rights it had under agreements between it and GM in the same paragraph where it was contemplated that the debtors would seek approval of an expense reimbursement and/or other buyer protection. It seems to me that, given that fact as well as the potential benefit to the debtors and creditors of a template in the form of the MDA for other competing bidders, that the Platinum/Parnassus entity should not be precluded under all circumstances from obtaining an appropriate expense reimbursement or buyer protection in the form of a breakup fee.

That being said, I believe that, on this record, the request as made by the debtor for an up-to thirty million dollar expense reimbursement is not reasonable or appropriate. I say that for two reasons. First, as an expense reimbursement, it very clearly covers expenses that very clearly, to me, would not be proper for this particular transaction. First, it covers expenses incurred very vaguely in connection with Platinum's analysis and research of the debtor going back three years, including in respect of times when, according to Mr. Sheehan's affidavit, the debtor was committed to other transactions and so advised Platinum, as well as in connection with a transaction involving Platinum's

proposed purchase of the debtor's steering business that, apparently through no fault of Platinum, fell through. That asset is now being sold not to Platinum but transferred to GM under the transactions at issue.

In addition, the proposed thirty million of expenses includes several million dollars, at least, of internal Platinum expenses, which are not described but, very clearly under the terms of this motion, could include salaries and overhead of Platinum workers, which I believe would be wholly inappropriate for an expense reimbursement in connection with a transaction that ultimately developed after GM, on April 18th of 2009, and the auto task force, at the same time, informed the debtors that, contrary to the earlier statements of the auto task force, GM, through the government, was prepared to finance substantially all of the debtor's proposed exit from Chapter 11.

The Platinum transaction was negotiated after that date, and I do not believe that it should be linked to GM or the government's contributions which they determined could be made before that date for purposes of determining what an appropriate expense reimbursement or breakup fee would be. On the other hand, I do believe that in drafting and preparing the documentation for that transaction, which under the terms of paragraph 46 of the order and under the debtor's representations at this hearing will be made available to

competing bidders, I believe Platinum has incurred expenses that it should, on an appropriate motion, be compensated for out of the proceeds of an alternative transaction.

But that's not what's been sought here. Rather, an expense reimbursement on this basis has been sought, which I believe would be unprecedented, and set an extremely bad precedent for the future. I believe that Platinum, being very well-advised, understands that proposition.

I have not viewed this as a breakup fee since it was described as an expense reimbursement, but I would also note that, based upon the value provided directly by Platinum as part of this transaction, I believe that thirty million dramatically exceeds the proper amount of a breakup fee, particularly in this context where there is a legitimate argument that Platinum has already agreed to go forward without anything by way of a buyer protection.

What I have in mind as something that might be appropriate is analogous to what was ultimately approved in the Refco case where I disapproved a breakup fee for a transaction that was clearly not supportive of the breakup fee but noted that the work done by that proposed buyer had provided a value to the debtor's estate. That amount was subsequently settled for, I believe, around a million-five. I'm not saying that's the right number here -- it may well be higher than that, as counsel for the committee acknowledged -- but I think it should

be tied to something akin to the expenses incurred by Platinum in negotiating this deal and the documents upon which it's based, which, again, can serve as a template for anyone coming in on short notice in connection with a bid and discussions with GM.

So for those reasons, I'll deny the motion. Counsel for the DIP agent can submit an order to that effect.

Now, there have been statements about a chambers conference. As you can see, I have a very heavy docket today. I'm happy to have a chambers conference with the parties about their due diligence issues, although I would note, having read the letter from Dechert, from Mr. Siegel, requesting a chambers conference, that came in on the 29th, it seems to me that almost all of the items on that list, which go to contracts and corporate documents, are items that, while they may not be in the data room, are items that the debtors, I would assume, have a pretty good handle on. This is a public company, and I would assume that they could obtain most of that stuff. And Mr. Butler's response has suggested that the debtors are in fact doing that. Clearly, the debtors keep track of the contracts that they have assumed, the contracts that they have assumed only as part of the plan and that therefore may be rejected ultimately since the plan has never gone effective, and the like, since they're repeatedly able to tell me the status of those agreements. And they have a good team at the debtors and

at Skadden dealing with contract issues.

So it seems to me that this information generally should be available either because it's a public company and therefore would be keeping track of litigation and government proceedings, environmental matters and tax matters, or because the debtors keep track because of their obligations under Section 365 of material contracts and intercompany agreements and leases. So it doesn't seem to me a chambers conference is necessary on this. If I'm missing something or if there is an impediment because the parties are desirous of every last document and the debtors are only able to produce documents readily and have to look for other ones, I don't see why this can't be worked out.

MR. KELLY: Your Honor, Mike Kelly. A propos of that, I just want to make one statement on the record, and it obviously has gotten a little bit heated at times. I've contacted the office; we do have one of the schedules Mr. Butler referred to. And I certainly don't want him walking out of here thinking that I misled.

On one of the assumed liabilities, Jack, we do have that schedule; we don't have some of the other ones that were mentioned.

I just didn't want the record to be --

THE COURT: All right.

MR. KELLY: -- inaccurate.

THE COURT: Well, it seems to me that there is -- I have gotten the impression that there's a bit of posturing going on here. And I think that if you have a due diligence team, it can sit down with the people who obviously have been available throughout this case, since I read Mr. Shaw's affidavit and Rothschild has been paid millions of dollars for this, that this should happen like that if it hasn't happened already.

And I take you at your word, Mr. Butler, that it has happened already, but it should happen, or else that money's coming back. All right? So that's the chambers conference.

MR. BUTLER: Thank you, Your Honor.

THE COURT: This is not a private sale. And if I find at the hearing that it was conducted that way, I don't care, it will not be approved.

Now, I believe you, at your word, that you are creating a public sale hearing and you are responsive, and I know there's nothing more frustrating than to be pillaried in the media for not doing it, but I want to make sure that it actually happens, and I will be furious if I find that there has been posturing when in fact it has happened. Okay.

MR. BUTLER: Thank you, Your Honor.

(Proceedings concluded at 12:05 PM)

I N D E X

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

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